In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11089

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

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v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF CROSS-APPELLEE

CHESTER BOWLES, Administrator, Office of Price Administration

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The main brief of the Administrator took the position that the evidence adduced at the trial overwhelmingly supported the findings of the Court, that the

conduct of the cross-appellee had been wilful within the purview of section 205 (e) of the Act, that it had been marked by deception and subterfuge, and that in the exercise of a sound judicial discretion measured by the requirements and purposes of the Price Control Act and the Regulation promulgated thereunder (See also Appendix in main brief) judgment in treble the amount of overcharges should have been granted.

The cross-appellant seeks a reversal first, on the ground that the District Court erred in its findings of fact; secondly, that the Court erred in its conclusions of law; and thirdly, that the Court erred in assessing any statutory damages, even if the violation were established.

The answer of the Price Administrator, in short, is as follows:

First, the findings of the District Court were not "clearly erroneous" Rule 52, Federal Rules of Civil Procedure, 28 U. S. Code foll. section 723c. They were clearly correct. The cross-appellant overlooks, or misapprehends, the record.

Secondly, the conclusions of law of the District Court flowed inevitably from the findings of fact, and the evidence supporting those findings.

Thirdly, the cross-appellant presents no mitigating circumstance to justify an assessment of less than full statutory damages. Its opposition to the Price Control Act and the applicable regulation remains undiminished.

I

The evidence adduced at the trial established a patent evasion of the Act and the regulation promulgated thereunder

In essence, the trial of the action revealed that the cross-appellant desired a greater amount for his meat than he could lawfully charge under the regulation; that he obtained this additional sum through the payment by the retailer of an additional 10% of the retailer's gross profit; that the device used to evade the price limitation contained in the Regulation was the "lease" and "contract of employment"; that the "lease" and "contract of employment" were never intended to do what they purported to do; and that in actuality the situation after the execution of the instruments was exactly the same as it had been before—except that the cross-appellant had an additional $19,149.64 for his meat. The discussion of the evidence is contained in the Administrator's main brief (pp. 7–11, 13–15, 26–32).

The cross-appellant here quarrels with the facts:

(a) It states in its brief (p. 3) that "it was not possible to buy livestock on the market and process it except at a loss." The Court refused to so find (R. 203).

(b) It states in its brief (p. 3) that the retailers requested cross-appellant to take over their markets. The Court was of the opinion that the request came from cross-appellant, and in a different form (R. 197). The Court had the opportunity to judge the credibility of the witnesses. See Rule 52, Federal Rules of Civil

Procedure, 28 United States Code foll. section 723c.

(c) The cross-appellant states that the rentals reserved in the leases were the reasonable rental values of the markets (p. 4). The Court below stated (R. 198): "The rentals that were fixed, the Court must find were arbitrarily fixed and were never fixed with any thought of actually being paid, *because there is no basis at all* to show why the minimum rental should be $25.00 as indicated by the stipulation in the evidence, and the maximum $35.00, when some of the places did a volume of business that went three and four times, according to the evidence, what it did in others."

(d) The cross-appellant states (Br. p. 4) that it ordered signs bearing its name; but in a period of four months not one sign had gone up (R. 79).

(e) The cross-appellant states that upon objection by the OPA it eliminated a cancellation clause in the lease, submitted the redrafted lease to the Office of Price Administration, and then negotiated the 25 leases and contracts (Br. pp. 4–5). It neglects to state that the employee of the Office of Price Administration to whom it showed the lease stated "that the answer must come from the Regional Office" (R. 162)—and that cross-appellant did not wait for the answer (R. 13).

(f) The cross-appellant insists that the chief attorney in the district Office of Price Administration approved its lease (Br. p. 17). The attorney denied that he had given such approval (R. 162, 163) and the Court refused to find that he had (R. 204).

(g) Cross-appellant states that it was not until July 30 that it was informed that its documents had been referred to the regional office (Br. p. 17), when actually it was so informed on July 1 (R. 160, 162)—and it insists that it had no knowledge that its conduct offended the regulation until the latter part of August (Br. p. 17), while conceding that its counsel and secretary (R. 153) received the letter of disapproval from the Office of Price Administration on July 31 (Br. p. 17).

(h) The cross-appellant states that similar leases had been approved by the Office of Price Administration (Br. p. 20). The record does not support that assertion.

(i) Cross-appellant characterizes its arrangement to reduce the payment by retailers of a percentage of the profits after September 24 (from 10% to 5%) as a "concession to the opinion or whim of the Litigation Attorney" (Br. p. 20). The evidence gives a different face to the transaction. The Office of Price Administration had informed cross-appellant that *any* deduction from gross sales of the retailers was a violation of the Regulation (R. 122, 187). The subsequent device of taking 5% instead of 10% of the retailers' profit was never revealed to the Office of Price Administration (R. 91–96).

(j) Cross-appellant asserts that the Court's Finding of Fact V is either "erroneous or too trivial to be of any persuasive force to the contention that the leases were not bona fide" (Br. p. 26). Finding of Fact V summarizes the evidence at the trial which disclosed that cross-appellant never paid or provided for pay-

ment of any social security tax for its alleged managers; never applied for a license to operate the stores; never paid any retail sales tax, nor filed any return; never inquired concerning the terms of the leases between the retailers and owners of the premises; that the rent fixed by cross-appellant was an arbitrary rent; that cross-appellant never gave any instructions as to the management of the markets, nor authorized any obligations incurred by the markets; that no notice of any change in operations was ever given to the public, and there actually was no change in operations; and that the retailers were required to pay cross-appellant a percentage of their gross sales of all meats in addition to the ceiling prices fixed by the Regulation (R. 30).

It is submitted that the evidence clearly supports the findings of the Court; that the findings were not "clearly erroneous", but were clearly correct. *Clark Bros. Co.* v. *Portex Oil Co.,* 113 F. 2d 45, 47 (C. C. A. 9th 1940); *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 433 (C. C. A. 2d, 1945), opinion by L. Hand, J.

II

The alleged lease and contract of employment were clearly designed to evade the Act and Regulation. The violation was conclusively established.

The cross-appellant argues (Br. p. 16, 23) that the "lease" and "contract of employment" created fixed obligations between itself and the managers; and that it assumed certain risks of loss with respect to third parties; that if it abrogated the contracts, it would incur liability for their breach.

This argument avoids the issue (See the discussion in the Administrator's main brief, pp. 13–18). Mere terminology in the contract is not decisive. Nor, indeed, does the allocation of risks between the parties and their rights inter se, necessarily control when the rights of the Price Administrator in his enforcement of the anti-inflation Act intervene. Compare, *United States* v. *Masonite Corporation,* 316 U. S. 265, 276; and cases cited in main brief (pp. 13–18). The enforcement of the Price Control Act is not intended to turn upon technical concepts of the law of contracts. Compare, *United States* v. *Lutz,* 142 F. 2d 985, 989 (C. C. A. 3rd, 1944).

The gravamen is the evasion of the price limitations contained in the Regulation by "direct or indirect methods;" the execution of an instrument devised to circumvent the statute and regulation. This the parties may not do. *Taylor* v. *United States* 142 F. 2d 808 (C. C. A. 9th, 1944); United States, ex rel *Brown* v. *Lederer,* 140 F. 2d 136 (C. C. A. 7th, 1944) cert. den. 322 U. S. 734.

Two cases recently decided in the Tenth and Seventh Circuits indicate the uniform condemnation of agreements designed to evade the provisions of the Price Control Act and the pertinent regulations thereunder. In *Schreffler* v. *Bowles* (C. C. A. 10th, January 12, 1946, unreported), a suit was instituted by the Price Administrator for treble damages under section 205 (e). Among other defenses, defendant pleaded an agreement with its customers which purported to appoint the defendant as a servant of his customer. De-

fendant argued that he was not subject to the Act because he was not engaged in the purchase and sale of any commodities. The District Court granted the motion for summary judgment. In affirming the judgment, the Circuit Court stated:

> The only defense which presented any possible factual question for trial was the eighth defense. The substance of this defense was that appellants were not subject to the Price Control Act or the regulations promulgated thereunder because they were not engaged in the purchase and sale of iron and steel products, but were merely acting as the servants of the various concerns with whom they were dealing. Appellants seek support for this position in a letter written by Aircraft Mechanics, Inc., dated February 26, 1943. The letter was written approximately a year after the relations between the parties had been established. It was apparently written for the purpose of clarifying these relations. It is long and detailed, and no attempt will be made to analyze its provisions in detail. It contains many of the elements of a contract of sale and purchase. The court was warranted in concluding that there was a sale and purchase, but the decision does not turn upon that point. Price Regulation No. 49 provides: "The price limitations as set forth in Price Schedule No. 49 shall not be evaded either by direct or indirect methods in connection with a purchase, sale, barter, delivery or transfer of iron or steel products alone or in conjunction with any other material, or by way of any commission, service, transportation, or other charge, or by way of

> discount, premium, or other privilege, or by way of tying agreement or other trade understanding, or otherwise." A reading of the entire letter leads to the inescapable conclusion that it exhibits a clear intent to evade the maximum price regulation by way of "commission, service, or otherwise." The gravamen is the evasion of a price limitation by direct or indirect methods, and this the parties may not do. The court was warranted in holding that the alleged contract was merely an effort to evade the Act and the regulations promulgated thereunder. The pleadings presented no substantial issue of fact. The only question was the legal inferences and conclusions to be drawn therefrom. The case was properly disposed of under the rule providing for summary judgment proceedings. We find no error in the proceedings before the trial court, and the judgment is therefore affirmed.

In *United States* v. *Steiner and Miller* (C. C. A. 7th, December 18, 1945, unreported), defendants were auctioneers who delivered tractors to the competitive bidder making the highest bid under an instrument termed a "Lease of Equipment." Under the terms of the "lease" the entire amount of the purported rental of the implements over a period of ten years was required to be paid before the "lessee" could take possession of the implement. In affirming the conviction, the Circuit Court states:

> The evidence discloses that there was executed at the time of the transfer and delivery of the implements in question an instrument designated as a "Lease of Equipment" which

was signed in a majority of the cases by the owner of the property therein designated as "the lessor" and the person to whom such implements were transferred and delivered and designated in the instrument as "the lessee." As before stated, it is the contention of the defendants that the transaction was, in fact, a lease, not a sale, and that, therefore, they (the defendants) did not violate the law, as charged in the indictments. It is important, therefore, to examine the instrument and the testimony of the witnesses to determine the question of whether this was, in fact, a good faith lease, or whether it was an instrument devised by the defendants to circumvent the statute and regulation. Such instrument was devised and prepared by the defendants or under their direction. The fact that it was entitled a "lease" does not mean, necessarily, that it was, in reality, a "lease," and not a contract of sale. The provisions of the instrument were the same in each instance, with the exception of "the character of the implement, the names of the parties (lessor and lessee) and the amount of the rental."

* * * * *

The mere fact that the equipment may have been leased would not necessarily be in violation of the law. But, if the purported lease was simply a vehicle for the circumvention of the law, and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price, then, such transaction would be in violation of the law and regulation if done knowingly, intentionally and wilfully. It cannot be denied that

> the amount received by the owner of the implements—whether it be termed rental or sale price was greatly in excess of the maximum or ceiling sale price of such implements. A careful examination of the "lease" and of the evidence leaves no doubt that the transactions were a wilfull attempt upon the part of the defendants to circumvent and evade the law and regulation, that such transactions were outright sales, and not leases, and were in excess of the maximum or ceiling prices as fixed by the law and regulation. There was competent and substantial evidence to support the verdict of the jury. * * *

It is submitted that the conclusion of law of the District Court that the leases and contracts made here by cross-appellant were forbidden evasions of the Reguation is amply supported in law and in fact. Cases cited by the cross-appellant (Br. pp. 36–38) are not to the contrary, and upon critical examination support the Administrator's position. In the Inland Empire Dairy Association and Kraft Cheese Company cases, involving farm cooperatives, the District Court found that the transactions were not intended as devices to evade the regulation; here the District Court found that they were so intended.

III

The evidence clearly establishes a wilful and deliberate violation of the Regulation by evasion and artifice. The cross-appellant remains unreconciled to the restraints of the Act and Regulation. The sound requirements of the Act necessitated the assessment of treble damages

The position of the Administrator that "discretion" within the meaning of section 205 (e) of the Emer-

gency Price Control Act is a sound judicial discretion exercised in the light of the public purposes of the statute has been discussed in his main brief (pp. 19–25). There was also set forth his contention that it was reversible error for the court to refuse to assess damages for a part of the period when the violations occurred, and an abuse of discretion to award less than treble the amount of overcharges for the entire period (pp. 25–32). The arguments of the cross-appellant here fortify the position of the Administrator.

The cross-appellant concedes that on August 30 it received a second letter from the Office of Price Administration (Deft.'s Exh. A–3, R. 87) advising it that its transactions constituted an evasion of the Regulation, requesting termination of the arrangements, and information as to the progress in bringing about rescissions.

What did the cross-appellant do to avoid further violations after being thrice told that its conduct was unlawful (R. 162, 122, 87)? The cross-appellant states (Br. p. 19); "While we look in vain in the transcript for some evidence of the activities of cross-appellant during the ensuing three weeks (after August 30), the inference is plain that cross-appellant was not successful in accomplishing mutual cancellations."

The plain, undisputed facts are that the cross-appellant spent the next three weeks devising a new method to evade the Regulation by accepting 5 to 7% of the retailers' gross profit, instead of 10% (R. 91–93). It made no attempt to cancel its arrangements;

on the contrary, its efforts were directed towards their continuance.

When, on October 4, the Office of Price Administration inquired whether the deductions from gross sales were still being made by the markets (Deft.'s Exh. A–6, R. 94), the cross-appellant, who was then receiving 5 to 7% of the retailers' profits in addition to the ceiling prices of the meat, replied: "We have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943" (Deft.'s Exh. A–7, R–96).

It is submitted that the cross-appellant wilfully and deliberately violated the Act and Regulation by trick, artifice and subterfuge. Its conduct demonstrated a callous disregard of the provisions of the Price Control Law. It deviates only once from its thesis that the "artificial control of prices of commodities is repugnant to the American conception of free trade and enterprise" (Br. p. 38) to remind this Court that if the judgment is permitted to stand it may be deprived of government subsidies (Br. pp. 30–32).

CONCLUSION

It is respectfully submitted that the judgment herein should be affirmed except insofar as it awards damages in the sum of only $21,726.89, and in that respect, the judgment should be vacated with direc-

tions to enter judgment in a sum treble the amount of the overcharges, as demanded in the complaint.

Respectfully submitted.

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